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IN THE
COURT OF APPEALS OF INDIANA

FRANCES L. ASHTON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0510-CV-934
	)	
CITY OF INDIANAPOLIS,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Theodore M. Sosin, Judge
Cause No. 49C01-0304-MI-1170

October 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

The Indianapolis Police Department's (IPD) Chief of Police, Jerry L. Barker (Chief Barker) demoted Frances L. Ashton, which the Indianapolis Civilian Police Merit Board (the Merit Board) upheld. The trial court affirmed Ashton's demotion. Ashton, an attorney, appeals *pro se*, and presents the following restated issues:

1. Was the Merit Board's decision supported by substantial evidence?
2. Did the trial court correctly interpret the merit law?
3. Did the Merit Board violate Ashton's due process rights?

We affirm. [1]

Following a hearing, the Merit Board issued findings, and the following is a summary of the facts as contained in those findings. Ashton was appointed to the IPD in 1990 as a recruit trainee, and was promoted to sergeant in June 1997. Pursuant to the IPD Rules and Regulations (the regulations), the IPD Chief of Police has discretion to suspend police officers for up to ten days without the right of review.

On April 6, 2000, Ashton "verbally berated" the manager of the Indianapolis Marion County 911 Center (the 911 center) "in a rude and sarcastic manner in the presence of his staff." *Appellant's Appendix* at 4. Based on this conduct, Chief Barker concluded Ashton violated Section VI of the regulations, which states, "[w]hen dealing

[1] The City of Indianapolis contends the instant case is now moot because Ashton was subsequently dismissed for reasons unrelated to the conduct for which she was demoted. Although the City of Indianapolis's contention has merit, we cannot say Ashton lacked any legally cognizable interest in the outcome. *See City of Gary v. Mitchell*, 843 N.E.2d 929, 936 (Ind. Ct. App. 2006) ("[a]n appeal is moot when it is no longer live and the parties lack a legally cognizable interest in the outcome or when no effective relief can be rendered"). Although Ashton may not have been able to regain the rank of sergeant in light of her termination, she could have recovered, among other things, lost wages equal to the difference between the salary earned by a patrol officer and a sergeant.

with the public, members shall not use language or gestures, which are rude, indecent, lewd, or discourteous." *Id.* at 2. The Board of Captains reviewed Ashton's conduct, and recommended she receive a one-day suspension. Chief Barker, however, rejected the Board of Captains' recommendation, and on September 20, 2000, restricted Ashton from entering the "MECA Center" without a supervisor. *Appellee's Appendix* at 2.

On April 11, 2000, Ashton confronted a fellow IPD sergeant in front of other officers during roll call. During the confrontation, Ashton told the sergeant, "this is fucking bull-shit." *Appellant's Appendix* at 13. The Board of Captains reviewed Ashton's conduct, and recommended she receive a suspension. On September 20, 2000, however, Chief Barker rejected the Board of Captains' recommendation, and issued Ashton a written reprimand for engaging in "conduct unbecoming an officer[.]" *Id.* at 4.

On December 19, 2000, Ashton had a confrontation with a retired IPD officer, Richard Fishback, during a traffic stop. "When Fishback identified himself as a Marion County Special Deputy, Ashton [stated,] 'isn't everyone.'" *Id.* at 62. Ashton further told Fishback, "(that) special deputy badge does not make you a police officer . . . [.] [I]n fact[,] the (Marion County) Sheriff likes us to take those (badges) from people if they embarrass the sheriff's department[,][] so don't present yourself as a police officer if you are not one." *Id.* Based on this conduct, Chief Barker determined that Ashton violated Section II(B) of the regulations, which states, "[m]embers shall improve performance, conduct, or attitude following disciplinary action concerning same." *Id.* at 3. On June 7, 2001, Chief Barker imposed upon Ashton a one-day suspension without pay.

On February 12, 2001, Ashton had another dispute with civilian employees at the 911 Center while she was on duty. During a police radio conversation and a subsequent telephone call, "Ashton made rude, insulting and intimidating comments."[2] *Id.* Thereafter, on January 20, 2002, in response to a "Disciplinary Action Report" regarding the February 12th incident, Ashton submitted an "Inter-Department Communication" (the memorandum) to Chief Barker. *Id.* at 54. In the memorandum, Ashton alleged: (1) IPD failed to provide her with notice of her deficient conduct; (2) IPD "inappropriately disciplined" her, *id.* at 55; (3) IPD deprived her of due process in its disciplinary actions taken against her; (4) IPD failed to properly train her after her conduct was determined to be deficient; (5) Chief Barker improperly considered certain conduct committed by Ashton in determining which violations Ashton committed and imposing punishment therefore; (6) IPD fabricated or misrepresented Ashton's history of conduct in determining whether she violated the regulations; (7) Chief Barker relied upon inaccurate and misleading transcripts in imposing punishment; (8) "Sergeant Hoenstine was hostile when [Ashton] requested . . . representati[on][,]" *id.* at 58; (9) IPD violated her rights under the "officers bill of rights," *id.*; (10) IPD conducted a "fishing expedition" in reviewing her job performance, *id.* at 59; and (11) IPD imposed excessive discipline. Chief Barker determined that Ashton's memorandum constituted a violation of Section IX(B) of the regulations, which states, "[m]embers shall be truthful in all official reports and correspondence." *Id.* at 11.

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[2] Ashton did not include a transcript of the radio conversation or the telephone call in the record on appeal.

In March 2002, the Board of Captains reviewed the disciplinary measures imposed upon Ashton stemming from the memorandum and her encounter with Fishback. Ashton was notified in July 2002 that she was being demoted from sergeant to patrol officer. Specifically, she was "provided with the Chief's Notice containing the charges against her[,] . . . [and] was further provided with the detailed findings of the Board of Captains that were specifically referenced in the Chief's Notice to her and which further detailed the basis for all charges against her." *Id.* at 12.

On July 23, 2002, Chief Barker charged Ashton with violating regulations: (1) Section II(A), which states, "[m]embers shall not conduct themselves in a manner which is detrimental to the efficient operation and or general discipline of the department[,]" *id.* at 2; (2) Section II(B); (3) Section II(C), which states, "[m]embers shall not have a record of repeated violations of departmental rules, regulations, orders, policies, and/or standard operating procedures[,]" *id.* at 4; and (4) Section IX(B). Based upon these violations, Chief Barker suspended Ashton for ten days without pay and demoted her from sergeant to patrol officer. The Merit Board held an evidentiary hearing on October 30, 2002, at which Ashton was represented by counsel. On March 27, 2003, the Merit Board issued a formal, written decision affirming Ashton's demotion from sergeant to patrol officer. The trial court affirmed the Merit Board's decision in all respects. Ashton now appeals.

1.

Initially, we address the parties' conflicting contentions regarding the appropriate standard of review. Ashton contends "IPD's Merit Board is a political subdivision, and not an agency," and the "standard of review for the legal interpretations of political

subdivisions is not the same as it is for legal interpretations of agencies, and deference need not be given legal interpretations of political subdivisions." *Appellant's Brief* at 5. The City of Indianapolis, however, contends the Merit Board is an administrative agency, asserting "review of an administrative decision is narrow . . . [and] may only be reversed . . . [upon] a showing that the decision was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." *Appellee's Brief* at 10-11.

Despite Ashton's assertion that the Merit Board is a political subdivision rather than an administrative agency, she goes on to state, "[a]n administrative agency, including IPD, may not disregard its own regulations in derogation of the statutory and the constitutional rights of others . . . ." *Appellant's Brief* at 8. In fact, Ashton refers to IPD as an administrative agency no less than eighteen times throughout her brief,[3] and refers to it as a political subdivision only once. Ashton's entire argument on appeal is based on her assertion that "[t]he Merit Board's decision . . . is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to a constitutional right, power privilege, or immunity; (3) in excess of statutory jurisdiction . . . or short of statutory right; (4) without observance of [required] procedure . . .; or (5) unsupported by substantial evidence." *Id.* at 4-5. That is, Ashton's argument,

[3] Ashton frames the first issue in her brief as, "Did the Circuit Court correctly apply the law to the facts in finding the *administrative decision* was supported by substantial evidence?" *Appellant's Brief* at 1 (emphasis supplied).

notwithstanding the sole reference to IPD as a political subdivision, assumes IPD is an administrative agency. Thus, we will treat it as such.[4]

Ashton contends the Merit Board's decision is unsupported by substantial evidence. Judicial review of administrative decisions is quite limited. *City of Indianapolis v. Woods*, 703 N.E.2d 1087. The reviewing court should give deference to the expertise of the administrative body. *Id.* Discretionary decisions of administrative bodies, including those of police merit commissions, are entitled to deference absent a showing the decision was arbitrary and capricious, an abuse of discretion, or was otherwise not in accordance with law. *Id.* Review of an administrative body's decision is limited to determining whether it adhered to proper legal procedures and made findings based upon substantial evidence in accordance with appropriate constitutional and statutory provisions. *Id.* The reviewing court may not substitute its judgment for that of the administrative body or modify a penalty imposed by that body in a disciplinary action absent a showing that such action was arbitrary and capricious. *Id.*

The party challenging the administrative action bears the burden of proving such action was arbitrary and capricious. *Id.* An arbitrary and capricious decision is one that

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[4] We note an apparent split of authority regarding whether a police or sheriff department's merit board is a political subdivision or an administrative body. *Compare, e.g.*, *City of Greenwood v. Dowler*, 492 N.E.2d 1081 (Ind. Ct. App. 1986) (Greenwood Police Merit Commission treated as an administrative body); *Pope v. Marion County Sheriff's Merit Bd.*, 301 N.E.2d 386 (Ind. Ct. App. 1973) (Marion County Sheriff's Merit Board treated as an administrative body); *City of Marion v. Alvarez*, 277 N.E.2d 916 (Ind. Ct. App. 1972) (City Board of Works and Public Safety for the City of Marion treated as an administrative body); *with Lake County Sheriff's Corr. Merit Bd. v. Peron, et al.*, 756 N.E.2d 1025 (Ind. Ct. App. 2001) (Lake County Sheriff's Corrections Merit Board treated as a political subdivision); *City of Indianapolis v. Woods*, 703 N.E.2d 1087 (Ind. Ct. App. 1998) (Indianapolis Civilian Police Merit Board treated as a political subdivision, but the Administrative Orders and Procedure Act was nevertheless applied), *trans. denied*.

is patently unreasonable, made without consideration of the facts, in total disregard of the circumstances, and lacks any basis that might lead a reasonable person to the same conclusion. *Id.* Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* We do not, nor does any reviewing court, reweigh the evidence. *Id.*

Ashton first argues there was a "[l]ack of substantial evidence to support ultimate [sic] finding of guilty [sic] with respect to false statements." *Appellant's Brief* at 15. Although she favors us with a thorough analysis of the differences between the definitions of "erroneous" and "false", Ashton fails to specifically, or even generally, identify which statement was incorrectly characterized as false. We have no basis, therefore, to say the Merit Board's conclusion that Ashton made false statements was arbitrary or capricious. *See Carter, et al. v. Indianapolis Power & Light Co., et al.*, 837 N.E.2d 509 (Ind. Ct. App. 2005) (issue waived because appellant failed to develop a cogent argument or support its argument with adequate citations to authority and the record), *trans. denied*.

Ashton next argues that "[c]ontradictory and inconsistent statements do not constitute perjury . . . ." *Id.* at 17. Regardless of whether Ashton's assertion is true, there is nothing in the record that indicates she was found to have perjured herself. Her argument in this regard is wholly irrelevant, and we decline to address this portion of her brief. *Am. Standard Ins. Co. of Wis. v. Rogers*, 788 N.E.2d 873 (Ind. Ct. App. 2003).

Ashton next argues that "[c]alling a two hour long investigation in 'how we got here' a fishing expedition is more akin to conclusion [sic] of law, or to opinion [sic]." *Id.*

To this end, Ashton engages in a two-page discussion of the meaning of "fishing expedition," which she concludes by stating:

> [f]rom the perspective of an officer whose employment contract requires notice of the charges prior to interrogation by internal affairs, provision of a representative during interrogation, and requires that questioning be directly and narrowly tailored to (wording) [sic] on [sic] the fitness for the job, this investigation, in which the investigator said there were no charges, (record at) [sic], did not provide at [sic] representative [sic], and did not ask narrowly tailored questions, and who allowed the interview to go on for 2 hours, this was a fishing expedition.

Id. at 18-19. As the quotation suggests, Ashton failed to provide cogent argument in this regard, including sufficient citation to the record. Her argument, therefore, is waived. *See* Ind. Appellate Rule 46(A)(8)(a) (providing appellant must contain contentions on issues presented and each contention must be supported by cogent reasoning, including citations to authority); *see also Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997) ("court which must search the record and make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator").

Ashton next argues that "[n]ot all 'unbecoming conduct' may from [sic] the basis of discipline . . . ." *Id.* at 16. Again, Ashton makes no particular assertion regarding the Merit Board's conclusion that she committed conduct unbecoming of an officer, but simply argues, "[a]lleged misconduct must bear a legal relation to either the police officer's fitness for holding the position or the officer's capacity to discharge the accompanying duties . . . ." *Id.* at 16-17. Thus, we have no basis to conclude the Merit

Board's decision in this regard was arbitrary or capricious. *Carter, et al. v. Indianapolis Power & Light Co., et al.*, 837 N.E.2d 509.

Ashton further contends "[c]alling the termination of medical benefits by misapplication of Workers Compensation Law to IPD Officer 'denial [sic] of medical treatment' is a legal conclusion . . ., and as such is not capable of being a false statement of fact." *Id.* at 19. We take this to mean that Ashton's memorandum, which stated she was erroneously denied medical benefits, cannot constitute a false statement of fact, and, therefore, there is insubstantial evidence to support the Merit Board's conclusion that she violated Section IX(B). The Merit Board found that Sergeant Oliver Jackson, IPD's medical liaison, presented evidence that refuted Ashton's contention that IPD terminated her medical benefits. Ashton did not include Sergeant Jackson's testimony in the appellate record, nor has she presented any other evidence that tends to refute the Merit Board's finding. Rather, Ashton relies on the theory that her memorandum simply stated a legal conclusion, that is, the Workers Compensation Act does not apply to police officers, and that legal conclusions cannot be false. Whatever the merits of her argument, she has failed to provide any citation to the record in support of her contention.[5] This argument, therefore, is waived. Ind. Appellate Rule 46(A)(8)(a); *Carter, et al. v. Indianapolis Power & Light Co., et al.*, 837 N.E.2d 509.

Ashton contends her "overwhelming perception of the interrogation as a whole was that it was extremely hostile based upon the Internal Affairs Investigator's blatant

[5] We note Ashton supported this argument by quoting a passage that, apparently, may be found in her appendix. As she did in an earlier argument, Ashton failed to cite to the page in her appendix where this statement may be found, merely providing, "(App). " *Appellant's Brief* at 19.

failure to respect proper procedure and the protections set forth in the . . . [r]egulations." *Appellant's Brief* at 19. We take this to mean that Ashton contends there is not substantial evidence to support the Merit Board's conclusion that she made a false statement in the memorandum to the effect that Sergeant John Hoenstine was hostile towards her. The Merit Board found that:

> [i]n [the memorandum], Officer Ashton charged, among many other things, that Internal Affairs investigator Sergeant John Hoenstine was hostile and denied her representation when he investigated the February 12 incident. She also alleged that he engaged in a two-hour interrogation and "fishing expedition". A tape of the telephone conversation between Officer Ashton and Sergeant Hoenstine, as well as a transcript of the interview and Sergeant Hoesntine's testimony, clearly contradict[] these allegations. Sergeant Hoesntine was very accommodating in his conversation and did not deny Officer Ashton representation.

Appellant's Appendix at 6. As before, Ashton did not include in the appellate record a taped recording of the telephone conversation between Sergeant Hoenstine and her, a transcript of the interview, or a transcript of Sergeant Hoenstine's testimony before the Merit Board. In fact, the only citations Ashton provides are to transcripts of the Merit Board hearing, which she did not include in the appellate record. This argument, therefore, is waived. Ind. Appellate Rule 46(A)(8)(a); *Carter, et al. v. Indianapolis Power & Light Co., et al.*, 837 N.E.2d 509.

Ashton contends there was a "[l]ack of [s]ubstantial evidence with respect to [a]'[h]istory of repeat [v]iolations' and [a] '[f]ailure to [i]mprove[.]'" *Appellant's Brief* at 20. Ashton's argument that there was a lack of substantial evidence is based wholly on our decision in *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981). In *Grisell*, however, the appellant "question[ed] neither the quality or sufficiency

of the evidence presented at that hearing . . . ." *Id.* at 250. The issues addressed in *Grisell* were "[w]hether Grisell was denied due process under U.S. Const. Amend. XIV because he was not represented by counsel at the Board of Captains hearing and because no record thereof was made[,]" and "[w]hether certain provisions of the 'Police Officer's Bill of Rights' are applicable to a hearing conducted before the disciplinary Board of Captains." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d at 249. *Grisell*, therefore, provides Ashton no direct support. Nevertheless, Ashton relies on *Grisell* for the proposition that "[a]ll charges must be proven anew during the merit board hearing." *Appellant's Brief* at 20. That is, Ashton construes *Grisell* to require the Merit Board to re-prove all former disciplinary actions heard before the Board of Captains that formulate the basis for an alleged violation of Section II(C) of the regulations, which states, "[m]embers shall not have a record of repeated violations of departmental rules, regulations, orders, policies, and/or standard operating procedures." *Appellant's Appendix* at 4. A brief review of *Grisell* is warranted.

In *Grisell*, the appellant was employed by IPD. The IPD Chief of Police informed the appellant that he was charged with violating the regulations, and ordered him to appear before the Board of Captains. The IPD Board of Captains recommended the appellant be found guilty of the charges and demoted from sergeant to patrol officer. The IPD Chief of Police relied on the recommendation, and demoted the appellant. The appellant appealed the demotion to the Merit Board, which sustained the appellant's demotion. On appeal, the appellant contended the Merit Board violated his due process rights because Ind. Code Ann. § 18-4-12-27(f) (repealed) required that "[t]he hearing

before the merit board . . . be *de novo* . . . ." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d at 250. We construed the statute to require the Merit Board to make findings of fact independent of the findings of the Board of Captains in order to ensure the hearing of the Merit Board was *de novo* and afforded an aggrieved officer all of the rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The instant case is distinguishable from *Grisell* in two important ways. First, as noted above, the appellant in *Grisell* did not contend there was a lack of substantial evidence to support the Merit Board's decision, as does Ashton. Further, the appellant in *Grisell* appealed the recommendations of the Board of Captains to the Merit Board. Ashton, however, did not appeal the Board of Captains' recommendations regarding the violations that constituted the basis for the charge that she had a history of repeated violations. Rather, Ashton merely appealed the Board of Captains' recommendation on the charge that she had a history of repeated violations itself. Contrary to Ashton's assertion, the Merit Board is not required to retry every past violation that constitutes the basis for a charge that an officer has a history of repeated violations of the regulations. *Grisell* does not stand for that proposition, and Ashton has provided no additional authority in support of her theory.

To summarize our discussion, Ashton contends the Merit Board's decision was not supported by substantial evidence. Ashton, however, has provided neither a sufficient record, citation to the record she did provide, nor cogent argument in support of her contention. We have no basis, therefore, to conclude the Merit Board's decision was

unsupported by substantial evidence. *Carter, et al. v. Indianapolis Power & Light Co., et al.*, 837 N.E.2d 509.

2.

Ashton contends the trial court misinterpreted the merit law. Specifically, Ashton asserts that "[i]nterpretation of IPD's Merit Law as [sic] a prerequisite reviewing [sic] its application." In support of this contention, Ashton undertakes a five-page discussion of the meaning of "just cause" while asserting, among other things, that "[t]he violations justifying discipline generally be considered [sic] 'misconduct[,]'" *Appellant's Brief* at 8, and "[t]he legislature never intended that the chief of police 'wield this power [to discipline] clandestinely and with virtually unbridled discretion[.]" *Id.* at 9. In her lengthy discussion of the meaning of "just cause", Ashton identifies neither the punishment that was unjust nor the conduct that gave rise to the punishment. We have no basis, therefore, to address her contention. *Carter, et al. v. Indianapolis Power & Light Co., et al.*, 837 N.E.2d 509.

3.

Finally, Ashton contends the Merit Board violated her due process rights. Specifically, Ashton argues that she "was demoted[] based upon embroidered charges . . . in violation of due process rights . . . ." *Appellant's Brief* at 23. Ashton, however, fails to identify which charges were "embroidered." We have no basis, therefore, to address her contention. *Carter, et al. v. Indianapolis Power & Light Co., et al.*, 837 N.E.2d 509.

To the extent Ashton makes any further arguments, they lack cogency and, thus, are waived. *See Carter v. Knox County Office of Family & Children*, 761 N.E.2d 431,

435 n.3 (Ind. Ct. App. 2001) ("argument waived because [of] Mother's failure to make a cogent [] argument").

Judgment affirmed.

MATHIAS, J., and BARNES, J., concur.